for the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

"The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination. As amended June 28, 1955, c. 190, Secs. 1, 2, 69, Stat. 183."

6. Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Statement of the Case

This prosecution originated in an Indictment which was found by the Grand Jury in the United States District Court, Southern District of New York, on the 20th day of July, 1955. The multitudinous indictment contained twenty-six counts, charging the defendant with wrongfully depositing for mailing and delivery certain matter alleged to be in violation of Title 18 U. S. C. §§2 and 1461, 62 Stat. 768, and a conspiracy count under §371, 62 Stat. 701.

The case came on for trial before the Hon. John M. Cashin, D. J., and a jury, on the 3rd day of January, 1956, and was concluded on the 12th day of January, 1956. In the course of the trial counts 12 and 25 of the indictment were dismissed on motion of the defense counsel with the Government's consent. Count 26, the conspiracy count, was dismissed on motion of the defense counsel after argument. The case went to the jury on the 12th day of January, 1956. They returned a verdict on that day finding the defendant guilty on but four counts, 10, 13, 17 and 24, and

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IN THE

Supreme Court of the United States

No. 582

SAMUEL ROTH,

Petitioner.

AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

DAVID VON E. ALBRECHT,
DAVID P. SIEGEL,
Attorneys for Petitioner.

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There is pending before this Court (sub judice) Butler v. Michigan case (a Detroit, Michigan case) and there is docketed before this Court the Alberts and Kingsley cases from California and New York showing the present national interest in relationship to the application of the First Amendment to the Constitution and other appropriate Constitutional protection against obscenity laws.

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IN THE

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No. .....

SAMUEL ROTH,

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AGAINST

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

The petitioner, defendant below, prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above entitled cause on September 18, 1956.

Opinions Below

The opinions of the Court of Appeals for the Second Circuit are not yet reported but are reproduced in the Appendix, *infra*, pages 2281-2341. The United States District Court for the Southern District of New York issued no opinion.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 18, 1956 (Appendix, *infra*, pp. 2342-2343). By order of Mr. Justice Harlan entered on October 9, 1956, the time for filing a petition for a writ of certiorari was extended to and including No-

vember 17, 1956 and the defendant was placed on bail of $5,000.00.

The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1).

Questions Presented

1. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the freedom of speech and freedom of the press guarantees of the First Amendment?

2. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the due process clause of the Fifth Amendment?

3. Does the federal obscenity statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) violate the First, Ninth and Tenth Amendments in that it improperly invades powers reserved to the States and to the people?

4. Did the trial court in its charge to the jury so dissect and oppose the collocation of terms in 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183 so as to render the statute vague and indefinite?

5. Did the trial court err in denying the motion of the defendant to suppress the evidence submitted under Counts 17 and 24 because such evidence was obtained without probable cause and by trick?

6. Was the federal district attorney's argument to the jury so inflamatory and prejudicial as to deprive the defendant of the fair trial contemplated by the Due Process Clause of the Fifth Amendment?

7. Was the trial court's charge as to the interrelationship of the different counts in the indictment so inconsistent as to make the verdict of the jury erroneous?

8. Were the publications, when considered in their entirety, obscene?

Constitutional and Statutory Provisions Involved

1. First Amendment.

> "Congress shall make no law • • • abridging the freedom of speech, or of the press • • •."

2. Fifth Amendment.

> "No person shall • • • be deprived of life, liberty, or property, without due process of law • • •."

3. Ninth Amendment.

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

4. Tenth Amendment.

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

5. 62 Stat. 768, 18 U. S. C. §1461 (derived from R.S. §3893, and originally passed as §148 of an Act of June 8, 1872, 17 Stat. 302). *Mailing obscene or crime-inciting matter.* This statute, upon which the Indictment is based, before its amendment, on June 28th, 1955, provided, insofar as pertinent, as follows:

> "Every obscene, lewd, lascivious or filthy book, pamphlet, picture, papers, letter, writing, print, or other publication of an indecent character; and
>
> "Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, • • •

not guilty as to the remaining nineteen counts of the indictment.

The judgment of the Court was rendered on the 7th day of February, 1956. The Court imposed a sentence on the defendant-petitioner of five years and a fine of $5,000 on count 10 (the defendant to be committed until such fine be paid), and sentenced him to a like term on counts 13, 17 and 24, running concurrently with the sentence of five years on count 10, and fined the defendant-petitioner $1 each on counts 13, 17 and 24, which fines of $1, however, were remitted.

The Government called in all some twenty-three witnesses. Of these witnesses, nineteen testified as to counts which were either dismissed, or as to which the defendant was found not guilty, and only four witnesses, including a Government inspector and postmaster, were heard as to the four counts on which the defendant was found guilty.

The Government put in evidence some thirty-five exhibits, which were read in whole or in part to the jury and which, of course, had a cumulative effect upon the jury, although out of the thirty-five only seven exhibits refer to the counts on which the defendant was found guilty. It will be seen that there was a preponderance both of witnesses and exhibits who, due to this multifarious indictment, were heard against the defendant on counts on which he was found not guilty.

It will be noted that in 18 U. S. C. §1461 as amended June 28, 1955, the words characterizing the obscenity as:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance;"

included "indecent" and "filthy" in a single characterization. There was no disjunctive between lasciviousness and the words "indecent" and "filthy". Furthermore, it will be noted that both sections as they appeared at the time of the indictment and trial and before contained an artificial definition of the term "indecent" in the following language:

> "The term 'indecent', as used in this section, includes matter of a character tending to incite arson, murder, or assassination. * * * *"

No reference was made by the Court to this specific legislative definition.

The Court of Appeals for the Second Circuit affirmed the judgment of the Court below but it felt constrained to refuse to consider the claim of the unconstitutionality of 18 U. S. C. §1461 on the ground that any such claim, as to this statute, was one for this Court alone.

Chief Judge Clark in the course of his opinion took occasion to say that the trial judge in imposing sentence pointed out that the defendant had been convicted several times before under both state and federal law (App. 2288). The petitioner contends that there was no basis in the trial record for this statement. He did not take the stand, so he did not give his side of the controversy. At the time of sentence, Judge Cashin did refer to the fact that defendant had been convicted on a number of occasions.

The defendant claimed before this Court that his previous encounters with the law arose as a result of his publications. Those cases in which he was convicted involved the sale of *Ulysses* by James Joyce, a book which was subsequently held to be not obscene in *United States* v. *One Book Entitled Ulysses*, 72 F. 2d 705 (2nd Cir. 1934) *affirming* 5 F. Supp. 182 (D. S. D. N. Y. 1933); the English version of Arthur Schnitzler's *Reigen*, a movie from which, under the title La Ronde, was permitted circulation by this Court in *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587 (1954); Sir Richard Burton's translation of *The Perfumed Garden*, a classic fourteenth century Arabic work; *American Anecdotes*, stories which are now available to the public; a translation of *The Anaga Ranga*, a famous Hindu classic dealing with the art of love in the style of the Latin Ovid; and two stories by Boccaccio that can now be obtained at the Public Library and purchased in any book store. His other engagements with the law, in which he obtained dismissals, involved the publication

of Benjamin Franklin's essay entitled *To a Young Man on How to Choose a Mistress; Celestine,* which is the English version of *The Diary of a Chambermaid* by Octave Mirbeau, and which the public library now have available on its bookshelves with an introduction by Jules Romaine; and *Beautiful Sinners of New York.* The defendant has written for such newspapers and magazines as the *Nation, Harper's Weekly, The Daily Mail, The Jewish Chronicle of London, The Boston Transcript* and *The New York Herald.* He is the author of several books, among them *Europe.* published by Liverright; *Now And Forever,* published by Robert McBride Co.; *A Study In Consciousness,* with an introduction by Sir Arthur Eddington, the great English philosopher and mathematician. The defendant is also the editor of Voltaire's *Philosophical Dictionary.* He has long been an important figure in the defense of free press freedoms.

REASON$ FOR GRANTING THE WRIT

I.

The Court of Appeals for the Second Circuit in sustaining the validity of the Federal Obscenity Statute (18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183) has decided an important question of Federal Constitutional Law upon which this Court has never squarely or directly passed, and which should be settled by this Court.

The federal obscenity statute involved in this case, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, derives from an act originally passed in 1872, more than three-quarters of a century ago, as a result of the efforts of that feverish Puritan, Anthony Comstock. By virtue of an intensive campaign in which he denounced opponents as lechers and defilers of youth and American womanhood, he succeeded in urging his bill through a busy Congress on the final day of its session. See Alpert, *Judicial Censorship of Obscene Literature,* 52 Harv. L. Rev. 40, 65 (1938). How-

ever, unlike other frenetic legislation which became dead in letter as in spirit (See e.g., *United States* v. *Williams*, 341 U. S. 70), this statute has not become a Victorian vestigial remainder, but has been actively and frequently enforced, recently amended (See 69 Stat. 183), and promised vigorous prosecution for the future. (See Report of the Select Committee on Current Pornographic Materials, H. Repres., 82nd Cong., pursuant to H. Res. 596 (1952).)

Despite the vitality as well as antiquity of the federal obscenity statute, this Court has never squarely considered or directly passed on the constitutionality of this statute. As Circuit Judge Frank in his concurring opinion in the Court below said:

> "True, the Supreme Court has said several times that the federal obscenity statute (or any such state statute) is constitutional. But the Court has not directly so decided; it has done so *sub silentio* in applying the federal statute, or has referred to the constitutionality of such legislation in dicta. The Court has not thoroughly canvassed the problem in any opinion, nor applied to it the doctrine (summarized above) concerning the First Amendment which the Court has evolved." (Appendix 2293.)

See also Lockhart & McClure, *Literature, the Law of Obscenity, and the Constitution*, 38 Minn. L. R. 295, 301, 352-358 (1954); Cushman, *National Police Power under the Postal Clause of the Constitution*, 4 Minnesota, J. L. Rev. 402, 411 (1920); Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. L. Rev. 703, 729 (1938).

This Court has decided cases involving obscenity statutes where the validity of the statute was not challenged [see, *e.g.*, *United States* v. *Alpers*, 338 U. S. 680 (1949)], and in dicta has commented favorably on such statutes [see, *e.g.*, *Winters* v. *New York*, 333 U. S. 57, 510 (1948); *Hannegan* v. *Esquire*, 327 U. S. 146, 158 (1946)], yet when the issue of the compatibility between a state obscenity statute

and the First Amendment was precisely raised and argued, the Court was equally divided and wrote no opinion. *Doubleday* v. *New York*, 335 U. S. 848 (1948). Indeed, on the most recent occasion this Court had to consider the constitutionality of obscenity legislation, it held, at the last term, in a *per curiam* decision, that a state obscenity statute relating to motion picture films was unconstitutional under the First and Fourteenth Amendments, saying simply: "Judgment reversed. *Joseph Burstyn, Inc.* v. *Wilson*, 343 U. S. 495; *Superior Films* v. *Dept. of Education*, 346 U. S. 587." *Holmby Productions* v. *Vaughan*, 350 U. S. 870 (1955), *reversing* 177 Kan. 728, 282 Pac. 2d 412.

The federal obscenity statute is nothing less than an assertion of federal criminal power over the contents of matter carried in the mails. In the series of cases beginning with *Burstyn*, this Court acknowledged the issue of state power over the contents of a mass medium, the motion picture film, as so important and so ripe for resolution as to warrant review. We believe that federal power over the contents of the press poses issues surely no less grave or unresolved. If it was appropriate for this Court in the motion picture cases to measure the respective values inhering in the conceded interest of a state in preserving morality and the First Amendment freedoms applicable only derivately through the Fourteenth Amendment, then it is urgent for the Court to evaluate and determine the conflict between the disputed federal power to safeguard morality and the freedom of the press as directly guaranteed by the First Amendment.

This case evokes issues which are timely, which are unsettled, and which are of heavy significance to all who use the mails to disseminate published utterances; the writ should issue.

II.

The Court of Appeals for the Second Circuit in sustaining the validity of the federal obscenity statute has decided a federal question in a way in conflict with applicable decisions of this Court in the past twenty-five years.

For nearly the first 130 years of its existence there were no important cases involving the freedom of speech and of the press guarantees of the First Amendment. As Chief Justice Vinson pointed out in *Dennis* v. *United States*, 341 U. S. 494 (1951):

> "No important case involving free speech was decided by this Court prior to Schenck v. United States, 1919, 249 U. S. 47." At 503.

It was not until the prosecutions resulting from World War I that the Court began to explore the implications of the constitutional guarantee for freedom of expression. And it was not until after the opinions of Chief Justice Hughes for the Court in *Stromberg* v. *California*, 283 U. S. 359, and *Near* v. *Minnesota*, 283 U. S. 697, in May and June 1931, that the First Amendment freedoms received their sturdiest development. Since that time, however, there have been many decisions invalidating various kinds of legislation as violating those First Amendment freedoms. An example at the last term is *Holmby Productions* v. *Vaughan*, 350 U. S. 870 (1955), *reversing* 177 Kan. 728, 283 P. 2d 412, in which the Court struck down an obscenity statute of the State of Kansas. Another recent example is *Winters* v. *New York*, 333 U. S. 507 (1948), *reversing* 294 N. Y. 545, in which the Court invalidated a portion of an obscenity law of the State of New York. If the reasoning in these and in numerous other recent decisions of this Court is applied to the federal obscenity statute in the instant case, 18 U. S. C. §1461, 62 Stat. 768, 69 Stat. 183, then this statute must be held to be unconstitutional as violating the freedom of the press guarantee of the First

Amendment and the due process clause of the Fifth Amendment. As Circuit Judge Frank stated in his concurring opinion in the Court below:

> "* * * I have much difficulty in reconciling the validity of that statute with opinions of the Supreme Court, uttered within the past twenty-five years, relative to the First Amendment as applied to other kinds of legislation." Appendix 2291.

However, he went along with his colleagues on the ground that the invalidation of this statute was the business of this Court.

A.

The federal obscenity statute violates the freedom of speech and of the press guarantees of the First Amendment.

The founders of this country, out of an abundance of caution, expressly provided: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *." They meant just that. In the past twenty-five years the Court has been approaching the intent and purpose of the First Amendment.

Legislation affecting freedom of speech or of the press, to be valid, must fall within certain narrow exceptions. The words must be such as are likely to incite to a breach of the peace [*Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942)], or such as have a sufficient probability to result in the overthrow of the government by force and violence [*Dennis* v. *United States*, 341 U. S. 494 (1951)]. Federal obscenity statutes do not fall within any of the narrow exceptions which the decisions of this Court have established.

There is no reasonable probability that allegedly obscene publications or pictures have any appreciable effect on the conduct of men, women or children. It is often assumed that so-called obscene publications or pictures will cause sexual delinquency. The truth of the matter is that we do

not know. The Court of Appeals of New York pointed this out recently:

> "It is noteworthy that studies are for the first time being made, through such scientific skills as exist, concerning the impact of the obscene, in writings and other mass media, on the mind and behavior of men, women and children. (See, *e.g.*, Jahoda and Staff of Research Center for Human Relations, New York University [1954]. The impact of Literature: A Psychological Discussion of Some Assumptions in the Censorship Debate.)" *Brown* v. *Kingsley Books*, 1 N. Y. 2d 177, n. 3, 151 N. Y. S. 2d 639, n. 3 [1956].

Such evidence as there is tends to indicate that neither publications nor pictures have much if anything to do with sexual or juvenile delinquency. Reference may be made in this connection to two studies, one by the Bureau of Social Hygiene of New York City and the other by the American Youth Commission, on young people in Maryland. Both studies bear out the fact that the sex education of the young comes from other sources than publications. Alpert, *Judicial Censorship of Obscene Literature*, 52 Harv. L. Rev. 40, 72; Bell, *Youth Tell Their Story*. The Bureau of Social Hygiene of New York City sent questionnaires to 10,000 college and normal school women graduates, 1,200 answers were received. Not one specified a "dirty" book as the source of sex information. Of the 409 replies in answer to the question as to what things were most stimulating sexually, the majority noted very simply, "man". The American Youth Commission for its study took Maryland as a typical state and interviewed 13,528 young people there. This study showed that the chief source of sex education for the youth of all ages and all religious groups was youth's contemporaries. Only 4% reported that they owed most to books.

A recent summary of studies on juvenile delinquency by professors Lockhart and McClure in *Obscenity In the*

Courts, 20 Law & Contemporary Problems 587, 596 (1955), contains these conclusions:

> "(1) Scientific studies of juvenile delinquency demonstrate that those who get into trouble, and are the greatest concern of the advocates of censorship, are far less inclined to read than those who do not become delinquent. The delinquents are generally the adventurous type, who have little use for reading and other non-active entertainment. Thus even assuming that reading sometimes has an adverse effect upon moral behavior, the effect is not likely to be substantial, for those who are susceptible seldom read. (2) Sheldon and Eleanor Glueck, who are among the country's leading authorities on the treatment and causes of juvenile delinquency, have recently published the results of a ten year study of its causes. They exhaustively studied approximately 90 factors and influences that might lead to or explain juvenile delinquency; but the Gluecks gave no consideration to the type of reading material, if any, read by the delinquents. This is, of course, consistent with their finding that delinquents read very little. When those who know so much about the problem of delinquency among youth—the very group about whom the advocates of censorship are most concerned—conclude that what delinquents read has so little effect upon their conduct that it is not worth investigating in an exhaustive study of causes, there is good reason for serious doubt concerning the basic hypothesis on which obscenity censorship is defended. (3) The many other influences in society that stimulate sexual desire are so much more frequent in their influence and so much more potent in their effect that the influence of reading is likely, at most, to be relatively insignificant in the composite of forces that lead an individual into conduct deviating from the community sex standards. The Kinsey studies show the minor degree

to which literature serves as a potent sexual stimulant. And the studies demonstrating that sex knowledge seldom results from reading indicates the relative unimportance of literature in sexual thoughts and behavior as compared with other factors in society."

Circuit Judge Frank quoted these conclusions and covered the authorities on this subject in the appendix to his concurring opinion. Appendix 2313-2321.

The federal obscenity statute, on its face does not fall within any of the narrow exceptions to the First Amendment; and there is no reasonable probability that allegedly obscene publications generally, and no proof that the publications of petitioner in particular have any appreciable effect on the conduct of men, women or children. In these circumstances the Court should hold this statute to be unconstitutional on its face and as here applied as violating the freedom of the press guarantee of the First Amendment.

B.

The federal obscenity statute violates the due process clause of the Fifth Amendment.

The concept of obscenity is as protean as any we have. There is nothing constant about it except its changeability. It changes not only from group to group but also from person to person. It changes not only from nation to nation but also from city to city and from city to country. It changes not only from one decade to another but also from one hour to another and from court to court. As Fluegel commented in The Psychology of Clothes (International Psychoanalytic Library, No. 18, Ernest Jones, M.D., ed. p. 19): "Even within a given circle of intimates, what is considered quite permissible on one occasion may, a few hours later, be regarded as veritably indecent." What was considered obscene ten years ago is not so today

and what is considered obscene today will not be ten years hence. The obscenity statute in the instant case, as Judge Frank pointed out in his concurring opinion, is thus "exquisitely vague". Appendix 2293. The word obscenity as Circuit Judge Frank stated in the appendix to his concurring opinion is one of "exquisite vagueness". Appendix 2340.

Accordingly, at the last Term the Court held that the word "obscene" was not a sufficiently definite one, at least upon which to base a system of prior restraint. *Holmby Products* v. *Vaughan*, 350 U. S. 870 (1955), reversing 177 Kan. 728, 282 P. 2d 412. That case involved the motion picture *The Moon Is Blue*. A Kansas statute set up a board of review for films, and provided that this board should disapprove of such films as were "cruel, obscene, indecent, or immoral, or such as tend to debase or corrupt morals". The board of review saw the film twice. The first time it disapproved with this notation: "Sex theme throughout, too frank bedroom dialogue; many sexy words; both dialogue and action have sex as their theme". Thereafter the plaintiff sought injunctive relief and the board placed its decision squarely on the word "obscene", saying: "* * * The Board has found that film to be obscene, indecent and immoral, and such as tends to debase or corrupt morals * * *".

The Supreme Court of Kansas in sustaining the board of review quoted the dicta from *Near* v. *Minnesota*, 283 U. S. 697, 716, (1931); *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 572 (1942); and *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495, 505, 506 (1952) to the effect that there might be a First Amendment exception for that which was obscene. Nevertheless, this Court reversed in a *per curiam* decision.

The statute which the Court struck down in *Holmby* was a civil as distinguished from a criminal one. But if the word "obscene" is not a sufficiently definite one in a civil statute, even though what is involved is a question of prior restraint, then it is clearly not a sufficiently defi-

nite one upon which to base a criminal statute. As the Supreme Court pointed out many years ago through Chief Justice Waite in *United States* v. *Reese*, 92 U. S. 214, 220 (1876): "Every man should be able to know with certainty when he is committing a crime."

Many times under the due process clause this Court has invalidated statutes which did not provide reasonably ascertainable standards of guilt. Two recent examples are *Winters* v. *New York*, 333 U. S. 507 (1948), and *Musser* v. *Utah*, 333 U. S. 95 (1948).

In the *Winters* case this Court held invalid a penal law of the State of New York which prohibited publications that massed in their pages stories of bloodshed and lust, saying:

> "The standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement. The crime 'must be defined with appropriate definiteness.' Pierce v. United States, 314 U. S. 306, 311; Cantwell v. State of Connecticut, 310 U. S. 296. There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment" (333 U. S., at 515).

In the *Musser* case the defendants preached polygamy and were convicted under a state statute which made it an offense to conspire to commit any action "injurious to public morals." There was a conviction which the Supreme Court of Utah affirmed, but this Court vacated the judgment and sent the case back for further proceedings not inconsistent with the Court's opinion. The Court, speaking through Justice JACKSON, said:

> "• • • Statutes defining crimes may fail of their purpose if they do not provide some reasonable standards of guilt. See, for example, United States v. Cohen Grocery Co., 255 U. S. 81 • • •" (333 U. S., at 97).

See also *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Herndon* v. *Lowry*, 301 U. S. 242; *Connally* v. *General Construction Co.*, 269 U. S. 385; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81; *Krauss & Bros.* v. *United States*, 327 U. S. 614; *Champlin Refining Co.* v. *Corporation Commission*, 286 U. S. 210; *Smith* v. *Cahoon*, 283 U. S. 553; *Cline* v. *Frank Dairy Co.*, 274 U. S. 445; *Collins* v. *Kentucky*, 234 U. S. 216.

We submit that Circuit Judge Frank was right in his concurring opinion when he stated that the federal obscenity statute did not have "a meaning sufficient adequately to advise a man whether he is or is not committing a crime if he mails a book or pictures. See, *e.g.*, *International Harvester* v. *Kentucky*, 234 U. S. 216; *U. S.* v. *Cohen Grocery Co.*, 244 U. S. 81; *Connally* v. *General Construction Co.*, 269 U. S. 885; *Cline* v. *Frank Dairy Co.*, 274 U. S. 445; *Champlin Refining Co.* v. *Commission*, 286 U. S. 120; *Lanzetta* v. *New Jersey*, 306 U. S. 451; *Musser* v. *Utah*, 333 U. S. 95; *Winters* v. *N. Y.*, 333 U. S. 507; *cf. U. S.* v. *Cardiff*, 343 U. S. 169." Appendix 2346.

Reference may further be made to additional movie censorship cases where the Court struck down statutes on the ground that the language in them was not sufficiently definite. *Superior Films Inc.* v. *Ohio*, 346 U. S. 587 (1954) (Ohio statute involving the use of the words "immoral, educational, or amusing and harmless character"); *Commercial Pictures Corp.* v. *Board of Regents*, 346 U. S. 587 (1954) (New York Statute using the word "immoral"); *Gelling* v. *Texas*, 343 U. S. 960 (1952) (Texas statute using the words "sexually immoral"); *Joseph Burstyn Inc.* v. *Wilson*, 343 U. S. 495 (1952) (New York statute using the word "sacrilegious").

Under the decided cases of this Court the words "obscene" (*Holmby Productions*), "immoral" (*Commercial Pictures*), "moral" (*Superior Films*), "sexually immoral" (*Gelling*), "sacrilegious" (*Burstyn*), "massed stories of bloodshed and lust" (*Winters*), "injurious to public morals" (*Musser*), are none of them sufficiently definite. Obscenity is capable of definition only by exhausting the list

of equally undefinable synonyms. "All courts agree that the definition of obscenity is limited to the exhaustion of its synonyms; the disagreement arises in the arrangement of them." Grant and Angoff, *Massachusetts and Censorship*, 10 Boston U. L. Rev. 36, 155.

If obscenity is a term soft in the center, fuzzy at the edges, and elastic throughout when the subject of local law, it is confusion hopelessly confounded when the subject of federal law. At least in a local law the term has reference to some community standards of decency and morality. Such definition may have some discernible signification in a relatively homogeneous community such as a town, county, city or even some states. But it is wholly impossible of intelligible or objective construction when the community is the Nation. What is obscene in Greenwich, Connecticut may not be obscene in Greenwich Village, New York; nudity means one thing to a naked boy on a sharecrop farm and another to a choir boy; a picture of a woman with her breasts exposed causes one reaction to the Florida resident who every day sees women exposed in the sun for tanning and another to a prim Bostonian. Perhaps some extreme polar connotations of the word "obscene" may be found which will cover every community; but every word—including admittedly vague words, such as "good" or "bad"—has such semantic qualities. For purposes of the Fifth Amendment the word "obscene" in 18 U. S. C. §1461, as applied, is fatally vague because the penumbra between what is "obscene" and "not obscene" everywhere in the United States is as vast as the Nation itself; such vagueness means that 18 U. S. C. §1461 contains no objective standards.

Nor is it any answer to this argument to say that a jury in each case decides what is obscene. A person still does not know in advance whether he is committing a crime. As Circuit Judge Frank pointed out in the appendix to his concurring opinion in the court below:

> "Each jury verdict in an obscenity case has been sagaciously called 'really a small bit of legislation ad hoc.' [U. S. v. Levine, 83 F. 2d 156, 157]. So each

> jury constitutes a tiny autonomous legislature. Any one such tiny legislature, as experience teaches, may well differ from any other, in thus legislating as to obscenity. And, one may ask, was it the purpose of the First Amendment, to authorize hundreds of divers jury legislatures, with discrepant beliefs, to decide whether or not to enact hundreds of divers statutes interfering with freedom of expression?" (App. at 2332).

Not only must statutes, particularly those with criminal sanctions, provide reasonably ascertainable standards of guilt in order to meet the requirements of due process, but, further, if such statutes involve First Amendment rights the standards which they prescribe must be particularly clear and precise. As Circuit Judge Frank pointed out in the appendix to his concurring opinion:

> "Even if the obscenity standard would have sufficient definiteness were freedom of expression not involved, it would seem far too vague to justify as a basis for an exception to the First Amendment. See Stromberg v. California, 283 U. S. 359; Herndon v. Lowry, 301 U. S. 242; Winters v. New York, 333 U. S. 507; Kunz v. New York, 340 U. S. 290; Burstyn Inc. v. Wilson, 343 U. S. 495; Callings, Constitutional Uncertainty, 40 Cornell L. Q. (1955) 194, 214-218" (App. 2341).

For additional authorities to the same effect see *Musser v. Utah*, 333 U. S. 95 (1948); *United States* v. *C.I.O.*, 335 U. S. 106, 150, 152; Note, 62 Harv. L. Rev. 77.

Since the federal obscenity statute does not provide a reasonably ascertainable standard of guilt, the Court should hold it invalid as violating the due process clause of the Fifth Amendment. Particularly should the Court reach this result because of two additional considerations: this statute involves criminal sanctions; and it applies to an area also under the protection of the First Amendment guarantee of freedom of the press.

III.

The federal obscenity statute is unconstitutional because it trespasses on the reserved powers of the States and of the people in violation of the First, Ninth and Tenth Amendments.

We believe that the absoluteness of the language of the First Amendment is no mere hyperbole. But the full import of that absoluteness emerges only when the First Amendment is considered in conjunction with the Ninth and Tenth Amendments. For while the First Amendment is not read as an absolute when Congress restricts speech incidental to the exercise of an enumerated federal power [*American Communications Association* v. *Douds*, 339 U. S. 382 (1950)], different considerations obtain when the Congress restricts expression unrelated to an expressly delegated federal power and affecting matters cognizable by the states [*Gitlow* v. *New York*, 268 U. S. 652, 672 (1925); *Beauharnais* v. *Illinois*, 343 U. S. 250, 288, 294 (1952)]. When the Congress undertakes, as it did by the federal obscenity statute, to punish expression as a breach of the peace or offensive to morality or decency, it lays claim to jurisdiction over matter the Constitution intended to reserve to the states and the people thereof—a reservation historically implemented by absolutely barring the federal government from an area in which that government was without delegated power.

The body of the Constitution as originally adopted had no reference to the freedoms of speech or press. In the convention of 1787 the delegates considered the advisability of incorporating a provision on the subject but decided to omit it as unnecessary:

> "Friday, September 14, Mr. Pinckney and Mr. Gerry moved to insert a declaration 'that the liberty of the press be inviolably preserved.'
>
> "Mr. Sherman: 'It is unnecessary. The power of Congress does not extend to the press.'

"On this motion it passed in the negative." Elliott's Debates 545 (1901).

Such diverse persons as Thomas Jefferson and Alexander Hamilton, who scarcely agreed on anything, did agree on this: that no power over the press or speech had been delegated to the federal government. Hamilton in arguing against the Bill of Rights said: "For why declare that things shall not be done, which there is no power to do? Why, for instance, should it be said, that the liberty of the press shall not be restrained, when no power is given by which restrictions may be imposed?" The Federalist 631 (Hamilton ed. 1864).

Jefferson responded:

> "Very well, I agree with you that the power is not legitimately here and that it was not intended to be here, and that it is a subject matter which belongs to the States, the same as a common police power of the States. But there is in the Constitution a provision that Congress shall have power to pass all laws necessary for the purpose of carrying into effect the powers here granted, and it might be held and construed to include regulation and legislation concerning the press. Therefore, accepting your view that it is not among such powers, we ask for a declaratory amendment to the Constitution which shall put it not among such powers, we ask for a declaratory amendment to the Constitution which shall put it beyond peradventure that it is not one of the powers granted to the National Government." As quoted in Hart, *Power of Government over Speech and Press*, 29 Yale L. J. 410, 412 (1920).

See also,

> Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. L. Rev. 703, 714 (1938).

In order to remove all possibility of doubt that Congress had no power over the press, not even an implied one, the First Amendment declared:

> "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

the Ninth Amendment provided:

> "The enumeration in the Constitution of certain rights, shall not be construed to deny or disparage others retained by the people."

and the Tenth Amendment added:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

The federal government was one of enumerated powers. This did not include any power over freedom of speech or of the press. That which the First Amendment absolutely barred to the federal government, the Ninth and Tenth Amendments reserved to the States and the people—the bar and reservation necessarily co-existing and complementing each other. Thus it was that "fighting words", libel, defamation, etc., were matter for state, not federal action from the beginning. Cf. *Beauharnais* v. *Illinois*, *supra*, at 290.

Mr. Justice Frankfurter, in his opening address at the conference on "Government Under Law" held on September 22, 23, and 24, 1955 under the auspices of the Harvard Law School, commemorating the two-hundredth anniversary of the birth of Chief Justice Marshall, pointed out:

> "Thus, the gravamen of the attack in the Virginia and Kentucky Resolutions against the Alien and Sedition Acts of 1798 was that they infringed on the rights of the states and were promotive of 'a general consolidated government.' It deserves to

be recalled that even Jefferson attributed to the states the power which he denied to the federal government. 'Nor does the opinion of the unconstitutionality and consequent nullity of the law—the [Sedition Act],' he wrote to Abigail Adams, 'remove all restraint from the overwhelming torrent of slander which is confounding all vice and virtue, all truth and falsehood in the US. The power to do that is fully possessed by the several state legislatures. * * * While we deny that Congress have a right to control the freedom of the press, we have ever asserted the right of the states, and their exclusive right to do so.' (I am indebted for the exact text of this letter, dated September 11, 1804, to the kindness of Professor Julian P. Boyd, in one of whose forthcoming volumes of 'The Papers of Thomas Jefferson' it will duly appear in its entirety.)" [*John Marshall and the Judicial Function*, 69 Harv. L. Rev. 217, 225-226 (1955)].

Similarly, an expert in the history of the American Revolution observed that Jefferson's fellow Republicans in Congress, while opposing the Federalists' Sedition Act, "were not willing to leave the press entirely free; [they] * * * regarded the punishment of libels and seditious speech and writings as a province of the states rather than of the Federal government. Nathaniel Macon declared that 'the liberty of the press was sacred'—but he meant only as against the Federal government, not against the states. Indeed, as he added, 'the states have complete power on the subject'." Miller, *Crisis in Freedom*, 168-169.

The dissents of Justices Holmes and Brandeis in *Gitlow v. New York*, 268 U. S. 652 (1925), carefully distinguished between federal and local power over freedom of expression. Mr. Justice Holmes there indicated that the word "liberty" as used in the Fourteenth Amendment perhaps "may be accepted with a somewhat larger latitude of in-

terpretation than is allowed to Congress by the sweeping language that governs, or ought to govern the laws of the United States" (268 U. S., at 672). This concept was expanded in *Palko* v. *Connecticut*, 302 U. S. 319 (1937), and became the basis for the Court's decision in that case. Later, Justice Jackson perceptively wrote in *Beauharnais* v. *Illinois*, 343 U. S. 250, 288, 294, 295 (1952):

> "As a limitation upon power to punish written or spoken words, Fourteenth Amendment 'liberty' in its context of state powers and functions have meant and should mean something quite different from 'freedom' in its context of federal powers and functions.
>
> * * * * *
>
> "The inappropriateness of a single standard for restricting State and Nation is indicated by the disparity between their functions and duties in relation to those freedoms.
>
> * * * * *
>
> "When the Federal Government puts liberty of press in one scale, it has a very limited duty to personal reputation or local tranquillity to weigh against it in the other. But state action affecting speech or press can and should be weighed against and reconciled with these conflicting social interests.
>
> "For these reasons I should not, unless clearly required, confirm to the Federal Government such latitudes as I think a State reasonably may require for orderly government of its manifold concerns. The converse of the proposition is that I would not limit the power of the State with the severity appropriately prescribed for federal power." (Dissenting opinion.)

We think that punishment of expression as obscene for offending decency, morality, or the peace falls within the category of those subjects intended to be reserved to

the States or the people and absolutely barred to the federal competence. The offense of obscenity, if any, is against the community and its standards, and it is the community which must find the wrong to have been committed; it is for this reason that the issue of obscenity is one of fact for the jury, the voice of the community. Grant & Angoff, "*Massachusetts and Censorship*", 10 Boston U. L. Rev. 36, 147.

It is precisely the predominant influence of the local community in the definition and determination of the offense of obscenity which places that offense outside the scope of federal power. What is the *national* community to which one is to look to define obscenity for *federal* purposes? There is none.

> "The insuperable obstacle is the size and diversity of our Federalism * * * a single federal law against obscene publications which is supposed to impose the same standards upon all the states controls the reading of New York and San Francisco, New Orleans and Boston. * * * Neither our racial nor religious alignments augur well for a federal control of the obscene * * *.
>
> "Apart from such racial and religious differences in fact, there is no uniform sense of the obscene. The federal postmasters have not even such slender moral clues for their guidance as state officials have in the enacted laws relating to the general protection of the public morals" (Ernst & Seagle, op. cit. *supra*, 70-72).
>
> "* * * there is no consistency in the decisions with respect to the same type of material from one period to another, or from one locale to another" Report of the Select Committee on Current Pornographic Material, 82nd Congress 34 (1952)].

The fallacy in hypothesizing some national community homogeneous as to matters of decency and morality—which is the indispensable prerequisite for federal obscen-

ity legislation—is no mere philosophical or abstract constitutional objection. In a very real and substantial way it impairs freedoms which must be left to the states. For when the federal government prosecutes and punishes the mailing of a publication, the effect is to ban the mailing thereof in every state; *even those states and communities which would not deem the mail indecent or immoral or obscene.* Differences in the application of substantially identical standards by New York and Boston have been fully documented. Grant & Angoff, *op. cit. supra*, 164-172, 151-2; Alpert, "*Judicial Censorship of Obscene Literature*", 52 Harv. L. Rev. 40, 53 ff. In addition, the different states have vastly differing legislative and judicial provisions concerning divorce, adultery, and fornication (Ernst & Seagle, *To The Pure*, 72)—important constituents in defining the morality of a community. Accordingly, unless the federal government undertakes to measure the mails by the standards of the most liberal community—a charge to which it will surely demur—the federal power over obscenity involves foreclosing to some communities mail and literature they would not consider objectionable. Plainly, then, the absence of any national community, and the bewildering varieties of local communities, preclude the existence of any federal power over matters of obscenity, and confine that power to the states and to the people.

That power which the Ninth and Tenth Amendments vest in the States and the people and the First Amendment expressly takes from the Congress is not to be subsumed from the postal power contained in Art. I, §8, cl. 7 of the Constitution. Under that postal power, Congress may act to protect the physical integrity of the mail or of the instrumentalities for their transmission. See *e.g.* 18 U. S. C. §§1691-1733, 62 Stat. 776-785). But Congress may not act to supervise the written content of that which passes through the mail. The job of the post office department is that of carrying the mail not of censoring it. As Judge Arnold so aptly put it in the concluding paragraph of his opinion in *Esquire* v. *Walker*, 151 F. 2d 49, 55 (1945),

affirmed sub nom. Hannegan v. *Esquire*, 327 U. S. 146 (1946):

> "We believe that the Post Office officials should experience a feeling of relief if they are limited to the more prosaic function of seeing to it that 'neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds'."

The first proposal to restrict the use of the mails by printed matter because of its content came in 1835. In December of that year President Jackson proposed the passage of a law which would prohibit the use of the mails "of incendiary publications intended to instigate the slaves to rebellion". Cong. Globe, 24th Cong., 1st Sess., 10 (1835). Northern anti-slavery agitation had become violent and the dissemination of abolitionist literature from the north throughout the south had assumed dangerous proportions. Nevertheless the proposal was defeated, 25-19. It was defeated because the Senators, from the South as well as from the North, regarded legislation barring abolitionist literature from the mails as a violation of the freedom of the press guarantee of the First Amendment. The men who voted against President Jackson's proposal were men who understood the original meaning and purpose of the Bill of Rights. They were men who were already past their early childhood when the first ten amendments were adopted.

Because of the grave constitutional questions involved in President Jackson's proposal the Senate referred the measure to a select committee headed by Senator John C. Calhoun from South Carolina, bitter foe of abolitionist activities and intensely zealous for the enactment of some measure to avoid the horrible insurrection which he feared those activities were engendering. Yet he took his place with his Northern colleagues to denounce the measure as violative of the freedom of the press guarantee of the First Amendment.

On February 4, 1836, the select committee chaired by Senator Calhoun reported:

> "The committee fully concur with the President * * * as to the evil and its highly dangerous tendency, and the necessity of arresting it.
>
> "After the most careful and deliberate investigation, they have been constrained to adopt the conclusion that Congress has not the power to pass such a law * * *.
>
> "In the discussion on the point, the Committee do not deem it necessary to inquire whether the right to pass such a law can be derived from the power to establish post offices and post roads * * *. The jealous spirit of liberty which characterized our ancestors at the period when the constitution was adopted, forever closed the door by which the right might be implied from any of the granted powers, or any other source, if there be any other. The committee refer to the amended article of the constitution which, among other things, provides that Congress shall pass no law which shall abridge the liberty of the press—a provision which interposes, as will be hereafter shown, an insuperable objection to the measure recommended by the President * * *" S. Rep. 118, 24th Cong. 1st Sess. 1-3 (1836).

Senator Henry Clay, also from the South, as well as Senators John Davis and Daniel Webster, from New England joined in opposing President Jackson's proposal. They were sympathetic to the purposes of the measure, but they could not see their way clear to voting for it because of the prohibition of the First Amendment.

Senator Davis reminded his colleagues:

> "The liberty of the press was not like the other reserved rights, reserved by implication, but was reserved in express terms; it could not be touched in any manner."

In other words, power over the press was given neither expressly nor by implication to the federal government. On the other hand the denial of such power did not rest on any implication. That denial was in express terms: "Congress shall make no law * * * abridging the freedom of speech, or of the press * * *."

Senator Davis had this further comment, which is even more pertinent today than when it was uttered:

> "The public morals were said to be in danger; it was necessary to prevent licentiousness, tumult, and sedition; and the public good required that the licentiousness should be restrained. All these were the plausible pretences under which the freedom of the press had been violated in all ages * * *."

Senator Clay "considered this bill unconstitutional" and as containing "A principle of a most dangerous and alarming character * * *. He had reached the conclusion that they could not pass any law interfering with the subject in any shape or form whatsoever * * *. The bill was calculated to destroy all the landmarks of the constitution, establish a precedent for dangerous legislation, and to lead to incalculable mischief * * *."

Finally Daniel Webster, whose influence on the early development of our constitutional principles was second only to that of Chief Justice Marshall, vehemently attacked the bill. He was "shocked" at the unconstitutional character of the whole proceeding. He declared that the freedom of the press included "the liberty of printing as well as the liberty of publishing, in all the ordinary modes of publication; and was not the circulation of papers through the mails an ordinary mode of publication?" Further: "Against the objects of this bill he had not a word to say; but with constitutional lawyers there was a great difference between the object and the means to carry it into effect * * * Congress had not the power, drawn from the character of the paper, to decide whether it should be carried in the mail or not; for such decision would be a direct

abridgment of the freedom of the press." See Cong. Globe 24th Cong. 1st Sess. pp. 36, 150, 164-165, 347-348, 351-354, 539.

This Court in an opinion by Justice Field reviewed these debates. *Ex parte Jackson*, 96 U. S. 727 (1878). Justice Field stated:

> "* * * In the Senate, that portion of the message was referred to a select committee, of which Mr. Calhoun was chairman; and he made an elaborate report on the subject, in which he contended that it belonged to the States, and not to Congress, to determine what is and what is not calculated to disturb their security, and that to hold otherwise would be fatal to the States; for if Congress might determine what papers were incendiary, and as such prohibit their circulation through the mail, it might also determine what were not incendiary, and enforce their circulation." At pp. 733-734.

For other accounts of this important incident in our history see 6 McMaster, *History of the People of the United States*, 288-291 (1883); Deutsch, *Freedom of the Press and of the Mails*, 36 Mich. Law Review 703, 717-723 (1938); Schroeder, *"Obscene" Literature and Constitutional Law*, 139-140 (1911).

In *Ex Parte Jackson*, *supra*, this Court further stated that the Fourth Amendment applied to the mails so as to protect sealed communications from unlawful searches and seizures. Justice Field writing for the Court said:

> "* * * No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution." At p. 733.

This has remained the unquestioned law. But it is impossible to reconcile this principle with the premise that the postal power is plenary. If the exercise of the postal power is subject to the restraint of the Fourth Amendment it must be equally subject to the restraints of the First, Ninth and Tenth Amendments. No distinction is possible.

The origins of the innocuous postal clause (see Rogers, *Postal Power of Congress*, p. 23; Cushman, *National Police Power Under the Postal Clause of the Constitution*, 4 Minn. L. R. 402), as well as those of the First, Ninth and Tenth Amendments confirm that if there are to be obscenity statutes, even with respect to the mails, they must be on a state and not a national level. "* * * the United States has no criminal jurisdiction over offenses against order and good manners * * *." Chafee, *Free Speech in the United States*, 150 (1941 ed.) "* * * the Federal government clearly has no control over individual morals * * *." Ernst and Seagle, *To the Pure*, 69-70 (1928). See also, Schroeder, *"Obscene" Literature and Constitutional Law*, 140-141 (1911).

We submit that an obscenity statute cannot meet the requirements of the due process clause of the Fourteenth Amendment; certainly on a federal level an obscenity statute should be held invalid not only because of the due process clause of the Fifth Amendment but also because of the prohibition of the First Amendment against any law abridging freedom of the press and the reservations of power to the states and to the people of the Ninth and Tenth Amendments.

IV.

Besides the reasons otherwise set forth in this application, there are special and important reasons for the granting of the writ of certiorari in this case, since there is great national concern over the question of the protection of the publisher, distributor, writer or individual under the First and Fifth Amendments to the Constitution involving the question as to whether or not these amendments do not protect against "obscenity" prosecutions and as applied under the circumstances of this case.

There is pending before this Court (*sub judice*) *Butler* v. *Michigan* case (a Detroit, Michigan case) and there is docketed before this Court the *Alberts* and *Kingsley* cases from California and New York showing the present *national interest* in relationship to the application of the First Amendment to the Constitution and other appropriate Constitutional protection against obscenity laws.

This application alone brings up the question of the prosecution of Section 1461 involving the Constitutionality of the federal obscenity statute and its application under the circumstances of this case to the defendant and other questions related to the prosecution of this case.

There has been docketed in the United States Supreme Court, the case of David S. Alberts, appellant, against State of California, in the October Term No. 61, which case is pending before this court.

There also has been docketed in the October Term 1955, No. 107, the case of Kingsley Books, Inc., Louis Finkelstein, doing business as Times Square Book Shop, and Martin Kleinberg, appellants, against Peter Campbell Brown, Corporation Counsel of the City of New York, Appellee.

In the *Alberts* case Jurisdictional Statement was filed on April 11, 1956.

Motion for leave to file brief *Amicus Curiae* was filed September 26, 1956, and on June 6, 1956, there was filed a brief in opposition to motion to dismiss or affirm.

Motion to dismiss appeal was filed on June 13, 1956, by New York City's Corporation Counsel.

In any event, these matters remain docketed in the United States Supreme Court and have not yet been acted upon but are awaiting the hearing and determination of the case of Alfred E. Butler, Appellant, against State of Michigan, Appellee, which was argued and heard before the Supreme Court some time in October 1956, but to-date there has been no determination.

The *Alberts* case raises the question whether a California Penal Statute proscribing obscene and indecent writings and books upon their face and as construed and applied to appellant, violates freedom of speech and press, and conflicts with the decision of *Holmby Productions* v. *Vaughan*, 330 U. S. 870, and additionally, within the area of freedom of speech and press, the statute and application thereof, denied appellant substantive and procedural due process of law.

The appellant (Alberts) claimed that the statutory standard proscribing "obscene and indecent" literature, violates the decision in *Holmby* v. *Vaughan*, and was unconstitutionally vague and unconfined, and a censorial proscription of ideas and speech, violating freedom of press and speech under the First and Fourteenth Amendments to the United States Constitution.

This was a *State criminal statute* that was involved.

The question presented in the *Kingsley Books Inc.* case involved the validity of a section of the law providing an additional civil remedy in the Supreme Court, by way of an action for an injunction, against the sale and distribution of written or printed matter found, after trial, to be obscene.

The case of *Alfred E. Butler* v. *State of Michigan* has already been heard before this court and has occasioned considerable interest.

In that case, Section 343 of Michigan *Penal* Code provided the following:

> "Any person who shall * * * sell * * * any book * * * containing obscene, immoral, lewd or lascivious language, or obscene, immoral, lewd or lascivious * * * descriptions (tending to incite minors to violent or depraved or immoral acts) manifestly tending to the corruption of the morals of youth, * * * shall be guilty of a misdemeanor."

Sharp challenge has been made that this section is in violation of the First and Fourteenth Amendments to the United States Constitution; that it is against freedom of speech and press clause of the Constitution; that the word "obscene" is so indefinite and vague, etcetera.

The issues involved in the *Alberts, Kingsley and Butler* cases are matters much less serious to the appellants there than the issue presented here.

In the *Alberts and Butler* cases, the criminal statute was a misdemeanor. In the *Kingsley* case it involved the enforcement of a civil remedy. In the present case, defendant received a five-year sentence and a substantial fine.

V.

Title 18, U. S. C., Section 1461 is unconstitutional. The conviction thereunder should be reversed.

Section 1461 reads as follows:

> "Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device, or substance; and—* * *
>
> Every written or printed card, letter, circular, book, pamphlet, advertisement, or notice of any kind giving information, directly or indirectly, where, or how, or from whom, or by what means any of such mentioned matters, articles, or things may be obtained or made, * * *

> The term 'indecent', as used in this section includes matter of a character tending to incite arson, murder, or assassination."

The Court in its charge omitted the last paragraph. Error might be claimed merely in the fact that the omission to charge the crime in the language of the statute was in itself sufficient to cause reversal. A graver question arises, however, for if one reads the statute and inserts the words, the statute would read "every obscene, lewd, lascivious, indecent, including matter of a character tending to incite arson, murder, or assassination, filthy or vile article, etc." It is obvious that when the statute is read as a whole, sense is lost and the charging words become so vague and indefinite as to render the statute unconstitutional. In *United States* v. *Alpers*, 338 U. S. 680, 682, the Court in an opinion per Mr. Justice Minton said:

> "We are aware that this is a criminal statute and must be strictly construed. This means that no offense may be created except by the words of Congress used in their usual and ordinary sense."

In dictionary usage "indecency" is a synonym for "obscenity". (See Funk & Wagnalls New College Standard Dictionary; Webster's New World Dictionary; The American College Dictionary.) The statutory definition of the word "indecent" is irreconcilable with usual and ordinary definitions of the word "indecency". No person could possibly conceive that the word "indecent" in the statute includes arson, murder, or assassination. The notion that a jury charged to consider a matter involving indecency would think that the term meant what the statute says it means, outrages sense. It may well be that instinctively the Court was outraged and, therefore, did not charge, in the language of the statute. We have hereinabove referred to numerous authorities on the requirements of certainty in definition of crime. This particular aspect of the case falls squarely within the condemnation in the opinion of *Winters* v. *New York*.

In that case the statute covered "any obscene, lewd, lascivious, filthy, indecent or disgusting book * * *." N. Y. Penal Law §1141(1). Paragraph 2 was added, which made it a crime to publish material "principally made up of criminal news, police reports, or accounts of criminal deeds, or pictures, or stories of deeds of bloodshed, lust or crime."

It was contended that paragraph 2 was unconstitutional and the Supreme Court accepted an interpretation by the Court of Appeals that the statute forbade the massing of stories of bloodshed and lust in such a way as to incite to crime against the person. The Court said per Mr. Justice Reed:

> "The impossibility of defining the precise line between permissible uncertainty in statutes caused by describing crimes by words well understood through long use in the criminal law—obscene, lewd, lascivious, filthy, indecent or disgusting—and the unconstitutional vagueness that leaves a person uncertain as to the kind of prohibited conduct—massing stories to incite crime—has resulted in three arguments of this case in this Court" (*Winters* v. *New York*, *supra*, at p. 518).

Here the Legislature might have enacted a specific crime of inciting to arson, or assassination by means specified. What Congress chose to do was to misdefine and destroy the word "indecent". They thus both destroyed the historic use of the word "indecent" in the collocation and at the same time, therefore, destroyed the certainty which that grouping of words had theretofore enjoyed. It created such a situation that the trial court did not even charge in accordance with the statute. The statute in its present form is void and conviction of the defendant here should be reversed.

Where a statute contains language in part which would render the statute unconstitutional, a conviction under a general verdict of a jury is not to be sustained. As was said in *Terminiello* v. *Chicago*, 337 U. S. 1, 5:

"Since the verdict was a general one and did not specify the ground upon which it rested, it could not be sustained. For one part of the statute was unconstitutional and it could not be determined that the defendant was not convicted under that part.

The principle of that case controls this one. As we have said, the gloss which Illinois placed on the ordinance gives it a meaning and application which are conclusive on us. We need not consider whether as construed it is defective in its entirety. As construed and applied it at least contains parts that are unconstitutional. The verdict was a general one; and we do not know on this record but what it may rest on the invalid clauses.

The statute as construed in the charge to the jury was passed on by the Illinois courts and sustained by them over the objection that as so read it violated the Fourteenth Amendment. The fact that the parties did not dispute its construction makes the adjudication no less ripe for our review, as the Stromberg decision indicates. We can only take the statute as the state courts read it. From our point of view it is immaterial whether the state law question as to its meaning was controverted or accepted. The pinch of the statute is in its application. It is that question which the petitioner has brought here. To say therefore that the question on this phase of the case is whether the trial judge gave a wrong charge is wholly to misconceive the issue."

Unless a jury charged to make a general verdict has before it a statute which read in its entirety is constitutional, it cannot render a proper verdict. This is particularly so in the light of the court's opinion in *United States* v. *Levine*, 83 F. 2d 156, 157:

"Thus 'obscenity' is a function of many variables, and the verdict of the jury is not the conclusion of a syllogism of which they are to find only the minor

premise, but really a small bit of legislation ad hoc, like the standard of care."

The bit of legislation required to be made by the jury could only follow an instruction under constitutional legislation in its entirety.

VI.

The admission into evidence of the testimony of Postal Inspector Nelson and Postmaster Johnston, and the introduction of exhibits during their testimony including Exhibits 7, 8, 9, 10 and 11, and the peremptory denial of the defendant's motion for their suppression, constituted a violation of defendant's rights under the Fourth and Fifth Amendments of the United States Constitution.

On the Government's direct case, Nelson, a postal inspector, testified he sent a letter to the Postmaster at Cordele, Georgia, on February 24, 1953, with instructions to the Postmaster that he should purchase a money order for $15.25; that the payee should be Golden Hind Books, New York, N. Y.; that the remitter should be Archie Lovejoy, and that this money order should be enclosed in an attached letter addressed to Golden Hind Books at 110 Lafayette Street, New York 13, N. Y., and that the envelope should be sealed and the letter deposited in the mails.

A money order receipt was to be returned to Nelson by Postmaster Johnston with return of this communication below, showing that this was deposited in the mails at the post office at Cordele, Georgia.

Wiley H. Johnston, the Postmaster at Cordele, Georgia, also testified.

The name, Archie Lovejoy, was that of a fictitious person. Johnston signed that false name. The mail was to be received at R.R. No. 5 in Cordele, Georgia.

It is conceded by the Government, and must be conceded on this record, that this was a scheme and plan which was initiated, instigated and provoked by inspector Nelson

against the defendant, and that it was done by trickery, device and forgery.

The mail was afterwards opened and examined and introduced in evidence.

The motion for the suppression of this evidence and the barring of any of the exhibits in connection with this matter, was properly and timely made by defendant's counsel when the witness, Nelson was on the stand, and also when the witness, Johnston, was on the stand, on the ground that the admission of this testimony and the introduction of the exhibits was barred and should be suppressed as an unconstitutional search and seizure, and as contrary to the Fourth and Fifth Amendments of the Constitution of the United States.

This affected the introduction into evidence of exhibits 7, 8, 9, 10 and 11 during the testimony of these witnesses on January 4, 1956 (S. M. pp.) which testimony was against the defendant under counts 17 and 24, upon which he was convicted.

The record shows on its face that there was no probable cause for the search or seizure without a warrant; there was no warrant issued for opening or using the defendant's mail; there was plenty of time for the issuance of a warrant.

That there was no probable cause is clearly shown in the following way:

A mere perusal of the addendum consisting of the Government's exhibits in the *Roth* case which gives the exhibit number, the description of the exhibit, the dates of the mailing, the indictment count number, the witnesses name and the date that the exhibits were marked for identification and in evidence, will show that it was exhibit 7, form 668, that was sent on February 24, 1953, by Nelson, to Cordele, Georgia. That the money order on its face shows it was sent on February 26, 1953, to Golden Hind Books by Postmaster Johnston.

The dates alleged in the indictment in the first count was a circular addressed to James Feldhouse and *dated February 15, 1955.*

The second count, a circular, addressed to Bill B. Klovski, *dated 2/18/55.*

The third count, circular addressed to Brooks Dyer was *dated 1/5/56.*

The fourth count, circular addressed to Mr. R. L. Bissler was dated 2//16/55.

The fifth count, circular addressed to Brooks Dyer was dated 5/25/55.

The sixth count, circular addressed to Uhlich Children's Home was dated 5/26/55.

The seventh count, circular addressed to Charles Berger was dated 6/28/55.

The eighth count, circular addressed to Mr. Richard G. Kahn was dated 4/28/55.

The ninth count addressed to N. W. Registry for Nurses was dated 5/24/55.

The tenth count addressed to Mr. Paul J. Masadowski was dated 12/10/54.

The eleventh count addressed to Duane Elliott was dated 1/3/55.

The twelfth count addressed to Gloria Jean Paulo was dated 12/24/54.

The thirteenth count addressed to Robert Mateinore was dated 11/9/54.

The fourteenth count addressed to Mr. J. Chapman was dated 4/18/55.

The fifteenth count addressed to Mrs. E. W. McCreery was dated 4/15/55.

The sixteenth count addressed to Mrs. Geo. K. Livermore was dated 7/20/53.

The eighteenth count carbon of letter signed Bernard Skriloff was dated 3/11/55.

The eighteenth count package addressed to Bernard Skriloff was dated 3/21/55.

The nineteenth count, package addressed to Bernard Skriloff was dated 3/18/55.

The twentieth count, carbon of letter signed George Blair was dated 4/6/55.

The twentieth count, form 688 sent by Daly to Dover, N. J. was dated 4/7/55.

The twenty-first count, carton mailed to Kings News was dated 6/30/55.

The twenty-second count, carbon mailed to Bell Block News Co. was dated 6/10/55.

The twenty-third count, package addressed to F. C. Weatherdon, Jr. was dated 5/21/55.

The twenty-fifth count, package addressed to Whispering Pines Tret. was dated 12/29/54.

Overt Act 4—Carton was mailed to Kings News 5/9/55.

Overt Act 2—Packing slip was mailed 1/6/56.

This has been set forth in extenso, to show that the record is barren of any probative evidence in this case or in this record that the postal inspector Nelson had any evidence of probable cause to believe that Roth was guilty of violating the postal laws.

It must further be kept in mind that the conspiracy count was *dismissed* (see dates involved); that all other counts except 10, 13, 17 and 24 upon which the jury convicted Roth, had been dismissed by the court or resulted in the jury's exoneration of not guilty; that this left count 10 (Madadowski) and count 13 (Mateinore) which circulars or material were sent out posterior in time November 9, 1954 and December 10, 1954, and that the letter or material referred to in count 17 was allegedly sent on February 19, 1954, and count 24 on *March 10, 1953.*

Thus there is nothing in this record whatsoever from beginning to end upon which the postal inspector or the Government can claim any *probable cause* as to violation of the postal laws by the defendant Roth; there was no *warrant* justifying the Government's action; there was no evidence or foundation laid for the Government's conduct; the application for relief under the Fourth and Fifth Amendments was timely and properly made; no bill of particulars had been granted to defendant; the indictment failed to set forth and give notice to the defendant the obscene matter referred to therein; and the defendant was

peremptorily shut off in his application and denied his rights under the Fourth and Fifth Amendments of the United States Constitution and was denied *hearing* or *relief* by the *summary* and *peremptory* denial of the Judge.

In *Ex-Parte Jackson*, 96 U. S. 727, 729, 733, the Supreme Court said, through Mr. Justice Field:

> "The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the People, of far greater importance than the transportation of the mail.
>
> * * * * * *
>
> The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution."

One of the safeguards around the right of search and seizure is the previous existence of probable cause. In the instant case this was supplied neither by the Government witnesses who obtained the evidence, nor by their knowledge of previous evidence of probable cause in the hands of others, for their testimony is silent as to this, and an examination of the indictment shows that the material in the hands of those other witnesses called by the Government

was obtained *subsequent* to the material obtained by entrapment.

There can be no presumption of guilt. On the contrary, there is a presumption of innocence. Unless the Government were able to establish guilt neither the Government nor the court below could assume guilt, or even the appearance of guilt, at the time of the entrapment. Even though on the trial there might be an appearance of guilt from the testimony of others, that would not sanction the use of evidence obtained by entrapment in the absence of guilt, or the appearance of guilt at the time and previous to the entrapment. Under those conditions there could be no probable cause and the record shows none. The introduction into evidence of the material obtained by these Post Office officials was plainly illegal.

In *Weathers* v. *United States*, 126 F. 2d 118, 119, the Court said:

> "It is well settled that when a person is reliably reported to be violating a law, or when the circumstances show it is likely, he may by an officer be tested by an opportunity, a decoy." (Emphasis added.)

The law is established in *Heath* v. *United States*, 169 F. 2d 1007, 1010:

> "It is well recognized that officers may entrap one into the commission of an offense only when they have reasonable grounds to believe that he is engaged in unlawful activities. They may not initiate the intent and purpose of the violation. In a case of entrapment, it is incumbent on the government to prove reasonable grounds to believe that the intent and purpose to violate the law existed in the mind of the accused."

In the absence of such foundation the motion to suppress the evidence should have been granted.

(A)

The evidence obtained by Post Office officials was illegally obtained by forgery and by trickery and device, and was opened and examined and introduced into evidence without warrant.

The testimony of the Post Office officials shows that they established Post Office boxes under false names; that they mailed such money orders to the defendant in order to induce the defendant to send to them material which they might later claim to be illegal for transmission through the mails. We have previously assumed that had the Department done this with knowledge of the commission of a crime, or of the intent to commit a crime, then there would have been probable cause for obtaining evidence. But such evidence could have been obtained forthrightly and with due regard to the sanctity of the mails. Even the Post Office officials and the District Attorney conceded on this trial that sealed mail is inviolate. But they chose rather to adopt trickery in order to decoy the defendant. Such trickery and fraud is not within the protection of the law, which allows entrapment lawfully done. The Post Office might well have received complaints from individuals. It might have received even from some of the witnesses in this case material which was claimed to violate the law in its transmission, but such evidence was not the basis for the entrapment, and could not have been. The only method of entrapment here and of obtaining this evidence without probable cause was by the trickery and device of the Post Office officials utilizing forgery and aliases. As was said in *Ex-Parte Jackson*, *supra*, at page 735:

> "Whilst regulations excluding matter from the mail cannot be enforced in a way which would require or permit an examination into letters, or sealed packages subject to letter postage, without warrant, issued upon oath or affirmation, in the search for prohibited matter, they may be enforced

upon competent evidence of their violation obtained in other ways; * * *."

The grievance in this case is that it was evidence obtained by opening mail without warrant, which evidence was obtained by trickery and device, and is contrary to law.

In *Sorrells* v. *United States*, 287 U. S. 435, which is cited with approval by the court in the *Weathers* case, *supra*, the Court, at page 445, quoted:

> "When the criminal design originates, not with the accused, but is conceived in the mind of the government officers, and the accused is by persuasion, deceitful representation or inducement lured into the commission of a criminal act, the government is estopped by sound public policy from prosecution therefor."

And again, at page 448, the Court stated:

> "We are unable to conclude that it was the intention of the Congress in enacting this statute that its processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them."

The concurring opinion of Mr. Justice Roberts in the *Sorrells* case (*supra*, at p. 454) defined entrapment as:

> "the conception and planning of an offense by an officer, and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer."

The concurring opinion, at page 457, stated:

> "The doctrine rests, rather, on a fundamental rule of public policy. The protection of its own functions and the preservation of the purity of its own temple

belongs only to the court. It is the province of the court and of the court alone to protect itself and the government from such prostitution of the criminal law. The violation of the principles of justice by the entrapment of the unwary into crime should be dealt with by the court no matter by whom or at what stage of the proceedings the facts are brought to its attention. Quite properly it may discharge the prisoner upon a writ of habeas corpus. Equally well may it quash the indictment or entertain and try a plea in bar. But its powers do not end there. Proof of entrapment, at any stage of the case, requires the court to stop the prosecution, direct that the indictment be quashed, and the defendant set at liberty."

Under the circumstances in this case, because there was no probable cause, because the testimony was obtained by trick and device, and because the evidence when obtained was opened without order or warrant therefor, the motion to suppress (made at S. M. P. 290-293) should have been granted under the provisions of both the Fourth Amendment as to evidence obtained by seizures and search without probable cause and under the Fifth Amendment as constituting a denial of due process.

VII

Of the twenty-four counts in the indictment, the petitioner was found guilty of only four counts.

A multifarious indictment and the prejudicial testimony and exhibits under the other twenty-two counts in the light of the charge of the judge and the summation of the District Attorney require a reversal because the petitioner was denied a fair trial and due process.

The indictment contained in all twenty-six counts. Three counts, Nos. 12, 25 and 26 were dismissed and the case was

submitted to the jury on twenty-three counts. The defendant was found guilty only on four counts, Nos. 10, 13, 17 and 24.

The Government called in all some twenty-three witnesses, of whom only four, including a postal inspector and postmaster were heard as to the four counts on which the defendant was found guilty. Nineteen of the Government's witnesses testified as to other matters but their testimony played an important part in the summation and consideration by the jury. In addition to the witnesses the Government put in evidence some 35 exhibits which were read in whole or in part to the jury and had in fact a cumulative effect upon the jury, although only seven of the exhibits referred to the grounds on which the defendant was found guilty.

VIII.

The Judge's charge as to the interrelationship of the counts of the indictment caused such confusion as to make the verdict of the jury erroneous and invalid. denied the defendant a fair trial and due process and denied him the clear charge that he was entitled to under the law.

The Judge's charge as to the interrelationship of the counts of the indictment caused such confusion as to make the verdict of the jury erroneous.

At S. M. P. 585, the Court charged:

> "It follows, of course, if you were to find the defendant not guilty on all of the first seventeen counts, you would have to find him not guilty on the remaining counts."

After the jury had retired, S. M. P. 591-2 discloses the following incident:

> "(The following took place at 6:07 p. m. in the robing room:)

The Court: I have another note from the jury, gentlemen. It says:

'We need a clarification of your charge, referring to counts 1 to 17 of the indictment as relating to the remainder of the counts.

'Specifically, did you say if the defendant is "Not Guilty" on the remainder, and why?' "

Then there follows a coloquy between counsel and the Court, S. M. P. 592, 593, 594, 595, 596, 597, which discloses that not only the jury but even counsel and the Court were incapable after a long discussion of reaching agreement on the significance and meaning of the Court's language. The Court, thereupon, undertook, S. M. P. 597, after counsel had left the robing room to frame a recharge and recalled counsel. Again a colloquy took place which covers two pages of the minutes and the jury were recalled. Thereupon, the Court had read to the jury the communication which he had received from them and had read to the jury the portion of the charge as indicated in chambers previously. He asked the jurors whether that helped them and further discussion took place at S. M. P. 600-601, following which the Court asked, "Does that answer your question? Does that clear it up?" The minutes show that the jury nodded assent. The Court thereupon said, "All right." A discussion then took place as to whether the jury should adjourn for dinner. Juror No. 5 asked that the jury to be given about three minutes before they went to dinner to make sure they had a meeting of the minds on what you had just told them. The Foreman asked, S. M. P. 602:

"The Foreman: Your Honor, would it be possible for the stenographer to transcribe that portion of the charge, have it right there?

The Court: I can't do that. I don't think I have any right to give you the charge. If it isn't clear to you, I will have him read it again.

The Foreman: I think we understand."

The entire proceedings occupied some 10 pages of the stenographer's minutes. It is evident that the question involved a finding of fact with regard to the advertising matter attributed to the defendant and the alleged non-mailable literature alleged to have been distributed by the defendant. It would appear that the Court was attempting in some way to impress upon the jury a relationship between the separate counts embodying advertising and literary matter and it is probable that the jury may have felt that it was essential for them to find some correspondence between counts 1 to 17 and counts 17 to 24 for it is significant that when they brought in their verdict they found the defendant guilty on 2 counts of the first group of 16 and 2 counts out of the group 17, *et seq., i.e.,* counts 10 and 13 out of the first group and 17 and 24 of the second group. *Strikingly enough count 10, count 1' and count 12 are identical except for the name of the addressee. The articles and things alleged to have been transmitted are identical. The testimony was in substantial agreement on all these counts. Yet, the jury found the defendant guilty only on count 10.* This could only have resulted from the confusion in their minds and a feeling from that portion of the charge of the Court under consideration here that there must be some corresponding relationship between counts in the first group and counts in the second group. Strangely enough count 17, on which the defendant was also found guilty, and count 24, on which the defendant was found guilty, relate to different matter. There was no correspondence between the alleged matter mailed nor uniformity with regard to the findings on the counts.

This confusion is understandable since it is obvious that counsel and the Court could not agree on the meaning of the charge. The last significant request of the foreman of the jury that that portion of the charge be given to them in writing sheds light. The jury gave formal assent to the Judge of their understanding but the foreman still could say that they wanted it in writing which must indicate to anyone trying to understand the process of adjudication that they needed more aid than they received.

The confusion here resulted from this attempt to include in one indictment too many counts. The attempt to create a multiplicity of crimes by combining in one indictment 26 counts inevitably leads to confusion. Certainly it did here. The jury's verdict resulting from the colloquies between counsel and the reframed charge of the Court indicate it. Such multifariousness in the indictment was bound to result in lack of due process. Process which is confused can never be due. Defendant was denied a fair trial.

IX.

Defendant was deprived of the fair trial contemplated by due process of law by virtue of the District Attorney's references to the witnesses and exhibits, which were improper, inflammatory and prejudicial.

The prosecution of the case was inflammatory and prejudicial; that from the very opening the District Attorney alluded to money,* though there was no evidence whatever in the case as to profit from the sale of any of the materials charged; this was the beginning note, it was also the concluding note of the summing up. In addition, the District Attorney's actual summing up is as a whole inquisitive and inflammatory, though it also contains many phrases which in themselves have been condemned—he apologizes for reading things which "would offend the sensibility of any decent person" (p. 559); he says he wants to "stop it" (p. 559); he calls upon the jury to help the United States Government enforce the law that has already been passed (p. 559); he points out that witnesses came at quite some inconvenience to themselves in order to stand up for what they thought was right (p. 560); he incites the jury to resent proper cross-examination of witnesses (p. 561); he suggests an invidious comparison between the

*"*To be realistic about it, there is money in this kind of dealing and you may be assured that there are a great many people who are watching this case with a lot of interest.*"

Govern ent's witnesses and those who are defending the case; he points out that the Government's witnesses "have done everything that they can do"; (p. 562) and suggests that they remind him (the District Attorney) of the jury, suggesting also that the jury "if this kind of thing had been pouring into your homes * * * would have been on the witness stand yourself"; he challenges the jury to do something by saying (563) "now those people have done everything they can do and they are interested in this case; they are interested to see what you are going to do now"; he reminds the jury of its strength to do what he is inciting it to do by saying "you are in a much stronger position than any one of those people, because you hold in your hands the power to make a final determination of this"; at p. 567 he reads a passage from a literary biography which was an exhibit and by it directly compares the defendant with the persons described in it, who are there called "jackals" (the defendant did not take the stand).

The Assistant District Attorney introduced in evidence a book entitled Aubrey Beardsley by Haldane McFall, Exh. 36, which was admitted without objection on January 9, 1956. This book was unfairly and improperly misused by the Assistant District Attorney.

In his inciting and inflammatory summation (P. 57 Government's appendix), the Assistant District Attorney told the jury:

> (567) "The Jackals who had egged him on to base ends and has sniggered at his obscenities, when his genius might have been soaring in the empyrean, could bring him scant comfort as he looked back upon the untidy patches of his wayfaring; nor were they likely ones to fulfill his agonized last wishes—indeed, almost before his poor wracked body was cold, they were about to exploit not only the things he desired to be undone but they were raking together for their own profit the earlier crude designs that they knew full well Beardsley had striven

his lifelong to keep from publication owing to their wretched mediocrity of craftsmanship."

In the re-cross examination by Assistant District Attorney (S. M. pp. 491-4 inclusive), will be seen how unfairly and deplorably he played up various aspects of this book.

No proof was ever introduced in evidence that the hearsay mentioned in this book was the *truth*. No other evidence was given in the case to show that *any of the facts* mentioned in this book about Beardsley were true.

The witness, Lorge, had never read the book. The defendant had not read the book. There was no evidence in the record at all to show that he ever knew this book existed or ever read any of its contents.

There was not the slightest evidence in the case that the defendant knew that Under The Hill was another title for Venus and Tannhauser.

The use made of this book by the prosecutor in his cross-examinations and in his summation were highly improper, inflammatory, incitative and incompetent, but helped foul the atmosphere so that the defendant never had his day in court.

In fact this court will notice that the defendant's counsel upon the conclusion of the District Attorney's summation said that it was incitative, but the court saw nothing improper in it.

Beginning with 567 and thereafter, the District Attorney talks of the work of the prosecution in the preparation of this case and (at 570) reaches a peak, calling once again attention to the fact "that there are many people who are watching this, because there is money in this", that people are going to be interested to see whether the jury was going to "make it legal or not" and winds up by saying "if you want me and these post office inspectors to continue to work and fight to stop this kind of thing, you can tell us that by bringing back a verdict as quickly as you possibly can, convicting him on every count in this

indictment, and we will do it. And if you don't care, or if you want to continue it, then acquit him, and I can assure you that the sewers will open."

For cases dealing with inflammatory summations see *N. Y. Central R.R. Co.* v. *Johnson*, 279 U. S. 310; *Berger* v. *United States*, 295 U. S. 78 and *Viereck* v. *United States*, 318 U. S. 236.

The above recital just covers the saliencies. The summing up as a whole was inflammatory. Immediately after its delivery, the defendant (p. 571 *et seq.*) objected to it and, charging that it was incitative, requested the Court to correct what had been done. The Court said (p. 572) "You may have your objection noted on the record. I see nothing improper in it. I will put it that way", and the defendant excepted.

It need not be pointed out that a jury is not brought into court to *help* the Government, but to sit *in judgment* as to whether or not the Government has made out a case beyond a reasonable doubt. (See District Attorney's remarks S. M. P. 559).

At (S. M. P. 570), the Assistant District Attorney said:

> "I told you in my opening statement that there are many people who are watching this, because there is money in this; this stuff will sell. They are going to be interested to see whether you are going to make it legal or not. Let me say this: if you want me and the post office inspectors to continue to work and fight to stop this kind of thing, you can tell us that by bringing back a verdict as quickly as you possibly can, convicting him on every count in this indictment, and we will do it. And if you don't care, or if you want to continue it, then acquit him, and I can assure you that the sewers will open."

This appeal to the jury to help the district attorney and the post office inspectors to continue to work falls within the condemnation of the language in *Berger* v. *United States*, 295 U. S. 78. The Court there said at page 88:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none."

Is it part of a jury's function to encourage a district attorney? Are they not to sit as impartial arbitrators or is the jury an arm of the district attorney's office?

In the light of these remarks of the district attorney, it cannot be said that the defendant had a fair trial.

X.

The publication American Aphrodite when considered in its entirety was not obscene.

Today in judging a publication the courts will (1) look at the publication as a whole rather than at certain parts; (2) consider the effect of the book on the average reader,

rather than on the salacious few; (3) consider whether the work under review is dirt for dirt's sake, in other words, whether one can see in it the leer of the sensualist; and (4) consider whether the dirt for dirt's sake is the dominant feature of the work, so dominant that it outweighs all other merits that the work may have. *Brown v. Kingsley Books*, 1 N. Y. 2d 177, 151 N. Y. S. 2d 639, affirming 208 Misc. 150, 142 N. Y. S. 2d 735; *Halsey v. New York Society for Suppression of Vice*, 234 N. Y. 1; *Walker v. Popenoe*, 149 F. 2d 511 (D. C. Cir.); *Parmelee v. United States*, 113 F. 2d 729 (D. C. Cir.); *United States v. Levine*, 83 F. 2d 156 (2d Cir.); *United States v. One Book Entitled Ulysses*, 5 F. Supp. 182 (D. S. D. N. Y.), affirmed 72 F. 2d 705 (2d Cir.). In *Brown v. Kingsley Books*, *supra*, the Court of Appeals concluded its opinion with this paragraph:

> "In reaching the conclusion which I do, I assume, of course, that the statutory prescription of obscenity will be applied with great care and selectivity so as not to interfere with the circulation of legitimate works of literature; that the libidinous character of a challenged work will be determined by viewing it 'broadly, as a whole', Halsey v. New York Soc. for Suppression of Vice, 234 N. Y. 1, 4-5, 136 N. E. 219, 220, with reference to 'its dominant effect'; 'not on any particular class, but upon all those whom it is likely to reach', United States v. Levine, 2 Cir., 83 F. 2d 156, 157; United States v. One Book Entitled Ulysses, supra, 72 F. 2d 705; 707-708, affirming, D. C., 5 F. Supp. 182; and that consideration will be given, among other factors to 'the established reputation of the work in the estimation of approved critics, if the book is modern, and the verdict of the past, if it is ancient'. United States v. One Book Entitled Ulysses, supra, 72 F. 2d 705, 708. The danger of arbitrary or erroneous decision under the statute is minimized by the availability of appellate review of the trial court's findings of fact. The same dan-

> ger is presented in criminal prosecutions for obscenity, and the remedy lies, not in preventing the state from more effectually enforcing its policy against the circulation of the obscene, but in making certain that the courts apply standards that will insure the least possible risk of interference with unobjectionable publications."

Nothing objectionable is to be found in the text of the publications involved in this case.

The test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. It is necessary to determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context, and we may not consider detached or separate portions in reaching a conclusion. It is necessary to judge the circulars, pictures and publications by present-day standards of the community; do they offend the common conscience of the community by present-day standards.

The book would have to have been read by the jury to determine whether it was obscene. This was not done or permitted.

XI

The Court in its charge incorrectly interpreted Title 18 U. S. C., Sec. 1461. It dissected and opposed the collocation of terms so as to render the statute vague and indefinite. (This Point is set forth in extenso in Point I of Appellant's Brief to the C. C. A., pages 7, *et seq.*).

The petitioner was deprived of his constitutional rights in a prosecution based upon a loose, vague and indefinite indictment, by a denial of a bill of particulars, by the looseness of the term 'obscenity' as applied in this case and as charged to the jury, and by the Assistant District Attor-

ney's use on recross-examination and in summation and otherwise against the defendant of the book "Audrey Beardsley," and by the unfairness of the prosecutor in making inflammatory and incitative and legally incompetent remarks and references to testimony and exhibits and thereby creating an atmosphere of unfairness to petitioner and by preventing petitioner from having a fair and impartial trial, by the failure of the Government to carry its burden of proof or to present any affirmative evidence of defendant's guilt, and by a confusing charge on the part of the Judge, which the jury did not and could not understand.

The Government had the burden of presenting affirmative proof of obscenity; that proof as to obscenity and the standards by which it can be recognized are available and presentable; indeed such proof was adduced by the defendant in this trial; that the Government's failure to adduce such proof placed upon the defendant the burden of proving his innocence.

That the statute indictment or charge under which the prosecution was brought and as construed and interpreted to the Jury both upon the trial and as charged by the Court was so vague and indefinite, that it consisted of question-begging words; that the statute and its interpretation did not have predictability, i.e., one could not tell from it what are the acts which it prohibits and against which it will invoke sanctions; that it is even more unpredictable when read with the cases; that the statute contains all of the vices pointed out with relation to a section of a similar New York State statute (old Sub. 2 of Sec. 1141 Penal Law of N. Y. discussed in the case of *Winters v. New York*, 332 U. S. 507).

That there was not shown in this trial any clear and present danger which might result from the distribution of the matter involved in these mailings; that in a case where an exception is being made to a constitutional guarantee, clear and present danger ought to be shown." See *Terminello* v. *Chicago*, 337 U. S. 1; *Commonwealth* v. *Gor-*

don, 66 Penn. Dist. & Co. Rep. 101 and *Walker* v. *Popenoe*, 142 Fed. 511.

That on all of the evidence, the government failed to make out a case. At the worst evaluation, there existed in law and fact a reasonable doubt in favor of the defendant and the government failed in its proof.

That from the nature of the verdict, it is clear that the jury did not consider the book charged in Count 24 (the other Counts on which the defendant was convicted deal with the mailing of circulars advertising this book) as a whole, and this despite repeated correct charges that they do so. See *U. S.* v. *One Book entitled Ulysses*, 72 F. 2d 705.

That this book, consisting of 200 pages, contained over and beyond the passages complained of in the trial, sections on literary history, poetry, short stories, and the entire book "Twilight of the Nymphs" by Pierre Louys; that the book, as a matter of law, was not obscene.

CONCLUSION

Since this case involves fundamental federal constitutional questions which should be settled by this Court, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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